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RES JUDICATA AND ITS APPLICABILITY TO JUDGMENTS

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DOES THE entry of an invalid judgment, not appealed from, make it res judicata between the parties that the judgment is valid, so that an action will lie to enforce it, or so that in another action between them they will be treated as if the rights it purports to bring into existence really existed? The American Law Institute in the most recent of its noteworthy contributions to legal literature, the Restatement of the Law of Judgments, says Yes, when it is good policy to treat the invalid judgment as valid between the parties, no, when it is not good policy to do so.¹

If considerations of policy are to determine how far a judgment shall be treated as conclusive, it seems that inquiry should be directed to the intention of the authorized deciders of policy, the framers of the constitution and statute from which the court derived its power, and that, though legislative provisions may be

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¹Restatement: Judgments, Section 10. Res Judicata and Jurisdiction over the Subject Matter. (1) Where a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the parties cannot collaterally attack the judgment on the ground that the court did not have jurisdiction over the subject matter, unless the policy underlying the doctrine of res judicata is outweighed by the policy against permitting the court to act beyond its jurisdiction.

(2) Among the matters appropriate to be considered in determining that collateral attack should be permitted are that

- (a) the lack of jurisdiction over the subject matter was clear;
- (b) the determination as to jurisdiction depended upon a question of law rather than of fact;
- (c) the court was one of limited and not of general jurisdiction,
- (d) the question of jurisdiction was not actually litigated;
- (e) the policy against the court's acting beyond its jurisdiction is strong.

See also Bennett Boskey and Robert Braucher, "Jurisdiction and Collateral Attack," 40 Columbia L. R. 1006, a well considered discussion which reaches conclusions similar in general to those of the Restatement.

interpreted in the light of policy, the question as to the effect of a judgment should depend on the intent the lawmakers have manifested as to what its effect should be.

In most cases the sole effect of a judgment, and in almost all cases its most important effect, consists in its effect upon the parties to it. Jurisdiction is given for the purpose of settling for the parties their rights against each other. If in a given case the legislators have deemed it good policy to withhold from a court power to make a valid judgment, it would seem that by withholding the power they have manifested a determination that the judgment shall not be treated as settling the rights between the parties merely because it was made. Or, to put it conversely, if the legislators intend that a judgment, if made, shall be effective between the parties, what reason have they for making it void as to third persons whose interest was insufficient to give them standing to be made parties, and what reason can a court have for imputing to the legislators an intent that it shall be void?²² If the Constitution or statutes are construed as intended to withhold from a court power to determine the rights of the parties, it goes a great way for judges to treat the judgment of that court as having determined their rights on the ground that it is policy to make it determinative of them.

According to the Restatement the validity, as between the parties, of an invalid judgment results, when it does result, from an application of a rule of *res judicata*. *Res judicata* is a rule of evidence. It makes a decision as to fact in one case conclusive evidence of the fact in another case. It is an artificial rule and like any artificial rule may be repealed by the makers of law. If the framers of a constitution have withheld from a court power to take from a defendant a right or to impose on him a duty, it would be strange to say that the legislature, though it cannot make the judgment effective against him in favor of a third person, may make it effective in favor of the plaintiff by saying that he shall be estopped from telling the truth about it, because, instead of

²²It may be granted that if a court enters judgment in the belief that it has jurisdiction, its belief is as likely to be true as the belief of another court that it had not. But if the second court is in error in thinking the first judgment invalid, the error may be cured by appeal and there is no sufficient reason why the appellate court should be bound by the decision of the first trial court. And that the judgment of the first court is likely to be correct would be as good a reason for holding it valid against all the world as for holding it valid between the parties. The result of holding it valid would be to give the court such power to make valid judgments as it reasonably believed it had. That such jurisdiction is frequently conferred on courts, see the cases cited *infra*, footnotes 26-30.

appealing from it, he saw fit to exercise his privilege of ignoring it. It is stranger still for a court to do so, and to do so when it likes the result, and to refuse to do so when it doesn't like the result. Calling it an application of *res judicata* doesn't make it such. To make a void judgment conclusive of its validity for the purpose of enforcing a right it purports to give, is not to treat the judgment as conclusive evidence of a fact. It is to make it in so far valid. It is an alteration of substantive right masquerading as *res judicata*.

However there are decisions of the United States Supreme Court that apply the phrase *res judicata* to the subject matter of judgments, which decisions are hard to interpret and to reconcile, and the authors of the Restatement may well have thought it necessary to reconcile them as best they could.

In *Valley v. Northern Fire Insurance Company*,³ a corporation alleged to be in the insurance business was adjudged to be an involuntary bankrupt, although the bankruptcy act provided that any moneyed corporation *except* an insurance company might be adjudged an involuntary bankrupt. The Supreme Court held that, although the time for appeal had gone by, the judgment must be vacated on motion because it was a nullity. Congress obviously did not intend to empower the court to put an insurance company into involuntary bankruptcy, and so the court did not have power to do so. It was immaterial that the question whether it did have power arose under a law of the United States, that the court by inadvertence or other error determined that it did have power, and that the time for appeal had gone by. Nothing in all that made it *res judicata* between the parties that the discharge was of any effect.

In *Kalb v. Feuerstein*,⁴ decided in January, 1940, it was held on the same principle and without dissent that the decree of a Wisconsin state court for the foreclosure of a mortgage on land, made pending bankruptcy proceedings against a farmer who owned it, was a nullity because an act of Congress forbade state courts to maintain foreclosure suits pending such proceedings. Hence it was concluded that neither the decree, a sale made pursuant to it, nor the confirmation of the sale by the court, made the validity of the foreclosure *res judicata* between the parties to it, and that consequently they furnished no defense to actions for restoration of possession, and for force used in ejecting him, brought by the bankrupt against the mortgagee who had pur-

³(1920) 254 U. S. 348, 41 S. Ct. 116, 65 L. Ed. 297

⁴(1940) 308 U. S. 433, 60 S. Ct. 343, 84 L. Ed. 370.

chased at the foreclosure sale and taken possession by aid of the sheriff. The act of Congress, said Mr. Justice Black, "is the supreme law of the land which all courts—state and federal—must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property *were considerations for Congress alone*" (italics supplied).

On the same day, and also without dissent, the same court held in the case of *Chicot County Drainage District v. Baxter Bank*⁵ that although the Constitution of the United States, as was decided in *Ashton v. Cameron County Water District*,⁶ upon the general principle that exempts state agencies from federal control, withholds from Congress power to authorize a federal court to discharge an insolvent state municipality from its debts, a federal court decree, made pursuant to an invalid amendment to the bankruptcy act, which decree purported to discharge a state municipality, was not a nullity, and that its entry, not appealed from, made it "res judicata" that the debt had been wiped out, and so constituted a defense to an action upon its bonds brought in a federal court. Nothing was said in the opinion to the effect that the Constitution of the United States, like the act of Congress in question in the Kalb case, is the supreme law of the land, and that the wisdom and desirability of ousting the United States government of jurisdiction over insolvent state municipalities were considerations for the framers of the Constitution alone.

Less than three months after the decisions in the Kalb and Chicot cases came the decision in *United States v. United States Fidelity and Guaranty Co.*⁷ The United States, in behalf of Indian wards, had filed a claim in bankruptcy proceedings. The bankrupt made a counterclaim for a greater amount and was awarded a decree against the United States for the excess. As in the Chicot case, no appeal was taken. In a later suit brought by the United States which involved the same parties, it was contended that the decree made the liability of the United States res judicata. But the Supreme Court held otherwise. It said that the bankruptcy

⁵(1940) 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. 329, rehearing denied, (1940) 309 U. S. 695, 60 S. Ct. 581, 84 L. Ed. 1035. For comments on this case, see 49 Yale L. J. 959-964, 54 Harv. L. R. 662-660; 28 Geo. L. R. 1006-1007, 1 Wash. & Lee L. R. 275-279. The decree purported to discharge a state drainage district from liability on its bonds unless their holders within a year accepted payment from a fund in court at thirty-six cents on the dollar.

⁶(1936) 298 U. S. 513, 56 S. Ct. 892, 80 L. Ed. 1309.

⁷(1940) 309 U. S. 506, 60 S. Ct. 653, 84 L. Ed. 894.

court had no jurisdiction over the United States except by consent of the United States. Its filing of a claim was not consent to the entry of a judgment for what might be due on a counterclaim. The *Chicot* case was therefore not directly applicable because on the counterclaim the defendant was not before the court. Nevertheless the Supreme Court went on to say that while the *Chicot* case "definitely extended the area of adjudications that may not be the subject of collateral attack," the decision itself was limited to judgments in bankruptcy under a statute subsequently held invalid, and that it did not declare an inflexible rule as to the susceptibility to collateral attack of judgments in general. The statement either repudiates the reasoning and therefore discredits the decision in the *Chicot* case, or else it interprets that case, correctly it is suggested, as holding that the judgment there in question made its subject matter *res judicata* for the reason that it was a valid judgment. For in the *Chicot* case the opinion purported to apply "the general principles governing the defense of *res judicata*," and said that "as the question of validity was one which had to be determined by a judicial decision, if determined at all, no reason appears why it should not be regarded as determinable by the District Court, like any other question affecting its jurisdiction." A judgment "that may not be the subject of collateral attack" or whose "validity" is to be "regarded as determinable" by the court that made it, is a valid judgment. Two months later, Mr. Justice Douglas said, in *Sunshine Coal Co. v. Adkins*^s that as previous cases had held; "in general, the principles of *res judicata* apply to questions of jurisdiction as well as to other matters—whether it be jurisdiction of the subject matter or of the parties."

It is no doubt because of these decisions and dicta that the Restatement of Judgments says in substance that a judgment which a court was not empowered to make will nevertheless, for the sake of ending dispute, be treated in other suits between the parties to it as if, instead of being void, it had fixed their reciprocal rights, except in cases where it is better not to treat it so, and that it then proceeds to enumerate various circumstances which, if they exist, make it better not to treat it so. The *Chicot* case is adduced in illustration as a case where the validity of an invalid judgment may not be collaterally attacked by the parties. Yet out of the five cir-

^s(1940) 310 U. S. 381, 403, 60 S. Ct. 907, 84 L. Ed. 1263. The "previous cases" cited are *Stoll v. Gottlieb*, (1938) 305 U. S. 165, 58 S. Ct. 134, 83 L. Ed. 104, and *Treimies v. Sunshine Mining Co.*, (1939) 308 U. S. 66, 60 S. Ct. 44, 84 L. Ed. 85. They are stated below. See notes 31 and 32. Neither case holds that an invalid judgment may be *res judicata* of its validity.

cumstances which the Restatement enumerates as tending to show that it is better not to treat the judgment as binding between the parties four were present in the *Chicot* case. First, the lack of jurisdiction in bankruptcy over the subject matter was clear because, before the District was sued upon its bonds and the validity of the discharge was brought into question, the Supreme Court in the *Ashton* case had expressly determined that Congress could not empower a court to discharge a state municipality, and it was in reliance on that determination that the suit was brought. Second, the determination as to jurisdiction in bankruptcy depended wholly on a question of law, for the question was whether federal power extended to such a release. Third, the question of jurisdiction in bankruptcy had not been litigated in the court that undertook to exercise it. The court had taken its jurisdiction for granted, together with the validity of the act of Congress that purported to authorize its exercise. Fourth, the policy against the court's acting beyond its jurisdiction would seem to have been strong, because it is important that the federal government should not usurp power reserved to the states. Therefore, though the Restatement does not question the soundness of the decision in the *Chicot* case, it recognizes it with a Judas kiss. It is strange to adduce an object in illustration of a snowball and then say of its qualities that they are those pertaining to a lump of coal. One is reminded of what Shakespeare's Antony said of the assassins of Caesar: "They bowed like bondmen" and then "behind struck Caesar on the neck." But to say that a principle is inapposite to a case to which it has been applied is not to condemn the principle itself. The Law Institute can hardly ignore a unanimous judgment of the United States Supreme Court. Yet, as has been suggested, the *Chicot* case may have gone upon a different ground from that attributed to it, and in bowing to its authority, the Institute has perhaps made a bow in the wrong direction. The case seems to have held that the judgment there in question was valid, and not that, though it was invalid, the losing party must not be permitted to say so. The case can better be discussed after considering the principles that govern *res judicata* and the validity of judgments.

In its second illustration of a situation in which the needs of policy are not strong enough to permit a party collaterally to attack an invalid judgment, the Restatement is also open to criticism. The case is *Davis v. Davis*,⁹ in which, as the Restatement interprets it, a Virginia decree of divorce was held to make it

⁹ (1938) 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26.

res judicata between the parties that the marriage had been dissolved, by making it res judicata that the husband was domiciled in Virginia, even on the assumption that the court had no power really to end the marriage, because neither party was really domiciled there. In the first place the case seems inapposite as an illustration. At most it holds, not that the validity of a judgment may be res judicata merely because it was rendered, but that a finding of fact on which an invalid judgment is based—the domicile of the husband—may be res judicata and thus indirectly estop the parties from asserting the invalidity of the judgment itself.¹⁰ Secondly, if it is true that the decree did not really end the marriage, a stronger case in which on grounds of public policy collateral attack by the defeated party ought to be permitted can hardly be imagined. If the marriage is not ended, the husband still owes the wife a duty to support her, but if the validity of the divorce is res judicata, she cannot enforce it. Yet he may be subject to criminal liability for not supporting her, and any third person who furnished her with needed support should be able to hold the husband for its value, for he claims reimbursement by a right of his own, acquired by having performed a duty resting on the husband, and not by any subrogation to a right of the wife. Whatever marital misconduct either might be guilty of in future, neither could get a divorce from the other, for it would be res judicata that they were divorced already. The policy of the divorce statute is defeated. It is true, that similar consequences might follow a judgment for plaintiff in a suit for jactitation of marriage, or in an action for assault, if marriage were pleaded in defense and found mistakenly not to exist; but they would be consequences of the ordinary application of res judicata to valid judgments, without regard to considerations of policy in the particular case.¹¹ On this theory of *Davis v. Davis*, a person who wins a contested decree of divorce, but is found to have mistaken the domicile, becomes for practical purposes single, for there is no enforceable right to consortium or support, and yet is forbidden to

¹⁰See Mr. Justice Jackson in *Williams v. North Carolina*, (1942) 317 U. S. 287, 319, 63 S. Ct. 207, 87 L. Ed. 189, footnotes 6 and 7 to his opinion. However in *Andrews v. Andrews* (1900) 176 Mass. 92, 57 N. E. 333, affirmed (1903) 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366, though the defendant appeared, the court did not hold res judicata the finding that plaintiff was domiciled in the state, presumably because it deemed the doctrine inapplicable to findings in an invalid judgment as well as inapplicable to the validity of the judgment itself.

¹¹However since the doctrine of res judicata in its application to matters of fact itself rests on policy, it is not always applied. See footnotes 15 and 18 *infra*.

marry anyone else. To forbid an unmarried person to marry is generally not due process of law. To bring about a situation practically identical with it can hardly be consistent with policy.¹²

There is an attractive simplicity in the doctrine of the Restatement that where a court makes a judgment that is void "and the defendant takes no proceedings directly to attack the judgment,

¹²In *Andrews v. Andrews*, (1900) 176 Mass. 92, 95, 57 N. E. 333, Holmes, J., repeating a remark to the same effect in *Adams v. Adams* (1891) 154 Mass. 290, 295, 28 N. E. 260, 13 L. R. A. 275, said: "As a general rule it would be inconvenient to admit that parties who were divorced as between themselves were not divorced as against others."

It would seem that a judgment valid between the parties ought to be and perhaps will be treated as valid altogether. In *Baldwin v. Traveling Men's Association* (1931) 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244, it was held that a defendant's appearance, though expressly made for the sole purpose of convincing the court that, since he had not been effectively served with summons, it had no power to affect his rights, nevertheless conferred on the court, on its mistaken finding that he had been served, a power to make the fact of service *res judicata*, and hence to estop the defendant to deny that the judgment was valid. This makes a special appearance in a federal court quite a different thing from a permitted method of convincing the court that it lacks power. It makes it confer power to control the defendant's rights so far as to render its judgment on the merits enforceable against him. If the defendant, remaining outside the state, had sent a messenger with affidavits to show he had never set foot in the state, the court might have received them, believed them insufficient to overcome the sheriff's return of service, and entered judgment by default, but the judgment would have been void, and the fact of service not *res judicata*. If instead of sending affidavits, the defendant sends witnesses to testify in person, with a lawyer to ask them questions, and the court without the entrance of formal special appearance consents to hear them, the result should be the same. But once the conclusion is reached that a special appearance in a federal court to contest jurisdiction is more than a mere attempt to convince the court that it ought not to proceed to judgment, but is granted only on condition of submission to the authority of the court to determine its jurisdiction, so that it estops to deny the existence of jurisdictional facts found, there seems to be no good reason why the determination that service was valid, being effective to make an estoppel, should not also be effective to make valid the judgment rendered in pursuance of it. It is as easy to say that the defendant, having invoked the court's decision as to its jurisdiction, has thereby empowered it to act on its decision and make a valid judgment, as to say he has empowered it to make a judgment whose validity he cannot dispute against the plaintiff. Had the defendant expressly consented to judgment provided it were found he was duly served, the judgment would be valid. If his special appearance is a submission to the decision as to whether he has been duly served that binds the parties to the judgment made, it should bind to the judgment everyone else whose interest in the matter at stake was insufficient to entitle him to a hearing as to what the judgment should be. A determination that service has been made is as likely to be true as would be a contrary determination in any other proceeding, and nothing can be gained by permitting the validity of the judgment to be questioned in further litigation by a third person merely on the ground of lack of service. If the judgment creditor can get service on the defendant in a second suit, he may sue him on the judgment. The debtor will be estopped to deny its validity and the judgment on the judgment will be valid against everybody. It is submitted that a judgment like that in the *Baldwin* case, if held to estop to deny service, should be held valid. Such a holding would be consistent with due process whether made pursuant to statute, (*York v. Texas* (1890) 137 U. S. 15, 11

the question whether he should be permitted collaterally to attack the judgment is a question of weighing the policy underlying the rules of res judicata against the policy prohibiting a court from exceeding the powers conferred upon it." Yet it may be suggested that on established principles that policy must always prevail which denies its purported effect to the act of a governmental

S. Ct. 9, 34 L. Ed. 604) or by ruling as to common law (*Chicago Life Insurance Co. v. Cherry*, (1917) 244 U. S. 25, 37 S. Ct. 492, 61 L. Ed. 966). Compare Restatement: Judgments, Secs. 9a, 20, b, c, to the effect that if a court has no power to give judgment against a defendant not served, it is not due process to give it on a mistaken finding of service. For similar reasons it may be strongly urged that the divorce in *Davis v. Davis* (1938) 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26, was valid. The decision, after hearing, that the husband was domiciled in Virginia was as likely to be correct as any later decision that he was not. Why permit its validity to be attacked in Virginia or elsewhere by a third person, and to depend in each state on the decision of its courts as to whether the determination of domicile of the Virginia or of the District of Columbia court was correct? Why permit a man who is a husband in one state to cast off his wife in another? It is true that the state of the actual domicile had an interest in the marital status of its domiciliaries, but that interest is practically destroyed by a doctrine of res judicata that permits them to live in the married state when they please, and to repudiate its mutual obligations when they please. It is true that holding the divorce valid would involve overruling *Andrews v. Andrews*, (1903) 188 U. S. 14, 23 S. Ct. 237, 47 L. Ed. 366, as for somewhat similar reasons *Haddock v. Haddock*, (1906) 201 U. S. 562, 26 S. Ct. 525, 50 L. Ed. 867, was overruled in *Williams v. North Carolina* (1942) 317 U. S. 287, 63 S. Ct. 207, 87 L. Ed. 189. In the latter case, Mr. Justice Douglas, for the majority, deprecated as inherently unsound a rule that would subject a man to imprisonment in one state for bigamous cohabitation with a woman who was his wife in another, or bastardize in one state children legitimate in another. He even expressly refrained from intimating an opinion as to whether, in spite of the decision in *Bell v. Bell* (1901) 181 U. S. 175, 21 S. Ct. 551, 45 L. Ed. 804, a divorce might not be entitled to full faith and credit as valid though neither party was domiciled in the state that assumed to make it.

One may wonder why the full faith and credit clause should be held to require, as *Williams v. North Carolina* holds that it does require, that the will of the state where one party to a divorce is domiciled to end the marriage shall prevail over the will of the other party's state that the marriage shall continue, as in South Carolina where marriage is indissoluble; and what the result would be if the legislature of one state on the application of its domiciliary passed an act to end the marriage, while the legislature of the state of the spouse simultaneously enacted that the marriage should continue. But if it is part of the purpose imputed to the faith and credit clause to make status as to marriage uniform throughout the Union, the purpose cannot be sufficiently attained unless a divorce made on a finding of domicile by a court that has the parties before it is recognized as valid. In *Stoll v. Gottlieb*, (1938) 305 U. S. 165, 171-172, 59 S. Ct. 134, 83 L. Ed. 104, if the interpretation of that case hereinafter suggested is right, Mr. Justice Reed probably thought that the judgments in the *Baldwin* and *Davis* cases were valid. But see Mr. Justice Jackson, dissenting, in *Williams v. North Carolina*, (1942) 317 U. S. 287, 320, note 7, 63 S. Ct. 207, 223, 87 L. Ed. 189. A divorce on mistaken finding of domicile in the state, where both parties were before the court, was held valid in *Kinnier v. Kinnier*, (1871) 45 N. Y. 535, 543, 53 Bar. 454. And see, *Campbell, J.*, dissenting in *People v. Dawell*, (1872) 25 Mich. 247, 270-3, and *Waldo v. Waldo*, (1883) 52 Mich. 94, 100, 17 N. W. 694.

agency outside the field of its power. Estoppel to deny its efficacy concedes to it its purported effect so far as the estoppel goes. Simplicity in statement may entail difficulty in application. The Restatement's theory requires the court to pick and choose among those judgments which the legislature has made void, and ordinarily to enforce as between the parties those which it thinks the legislature had little reason to make void. Policy would require, perhaps, that a judgment condemning to cruel and unusual punishment, or decreeing specific performance of a contract to labor as a slave, made on the theory that servitude voluntarily contracted for is not involuntary, should usually be held void, however high the court that may have affirmed it, unless that court's decisions bind as precedent, but as for a judgment that exceeds a restraint on power which the court sees little reason for, such as that preventing the federal discharge of a state municipality from debt, its validity should be held to be *res judicata*. If so, the principle ought to apply to the degree in which a judgment exceeds the judicial power, and the validity of a sentence to a punishment only a little cruel, or a condemnation to slavery for a very short time should ordinarily be deemed *res judicata*, if the hardship to the victim were thought to be less than the hardship that would be imposed on the court and the opposing party by having the case reopened. The ordinary rule of *res judicata* is not a matter of discretion and has no application to judgments. It applies only to findings about the relations between parties upon which judgments are based.

The rules of *res judicata* cannot be applied to the question of a judgment's validity in the way in which the Restatement proposes to apply it. So applied it becomes a rule new in nature and effect. It is true that the power of the court to render the judgment applied for is always practically, if not technically, in issue. The defendant may challenge the power, and whether he does so or not the court must make up its mind whether it has authority to enter the judgment it makes. But on what principle shall it be determined whether public interest requires that an end be put to litigation by pretending that a void judgment is valid? If the defendant was too poor or too ignorant to appeal, and especially if by law no appeal was open, it is strong medicine to enforce in the public interest a void judgment because it is too much trouble and expense to find out whether it was void. If it is not justice, and hence not policy, to enforce a void judgment against one who had no opportunity in fact to appeal from it, an

investigation should be made of his knowledge of his right and of his financial means. And if a defendant refrains from appealing solely in reliance upon the truth that the judgment in its purported effect is a nullity because its maker usurped a power he did not possess, why should it make a difference whether the usurper is a private arbitrator, an administrative commission, a justice of the peace, or a body of learned men who wear black robes?

If a judgment, either in substance or because of the procedure by which it was reached, is a judgment of a kind that the court lacks constitutional or statutory power to make, it must fail of effect for the same reason and to the same extent that the act of an executive or of a legislature of a kind it has not power to make fails of effect. For the same reason and to the same extent it should be treated by courts as without effect. A court cannot properly do that which it has no power to do, even though it or some other court has decided in a suit between the same parties that it will have power to do it. Similarly it cannot properly treat as effective the act of another court which it knows to have been beyond that court's power, simply because that court in a suit between the same parties decided that it would have power to do it. That is what was decided in *Kalb v. Feuerstein*.¹³ It is hard to reconcile that decision with the doctrine of the Restatement.

The difficulty and uncertainty attending the subject suggest inquiry into the principles that determine the validity of judgments, as well as into those that underlie the doctrines denoted by the ambiguous term *res judicata*.

RES JUDICATA

The questions that arise in a given case may be classified (among other possible ways) as follows 1. What is the case? 2. What ought the court to do about it? The answer to the first question states the facts of the case and the obligations of the parties toward each other that result from the facts. It does not include the general propositions of law in which their obligations may be expressed. Considered in relation to the second question, it is a question wholly of fact; although the answer to it, so far as concerns the obligations of the parties, depends upon matters of law. That A is B's promisor, and that A is B's debtor,

¹³*Supra*, footnote 4.

are in the sense here relevant equally matters of fact. It is immaterial that the fact that A is B's debtor is the result of a rule of law relating to the effect of promises.¹⁴ The answer to the second question—what ought the court to do about the case?—tells whether the court should dismiss for lack of jurisdiction or take jurisdiction, and, if it takes jurisdiction, deny relief on the merits, or give relief, and, if so, what relief. It is a question wholly of law. It relates, not to the basis of the court's action, but to the action itself, although the answer to it depends on the facts of the case, including the facts as to the obligations of the parties that grow out of the primary facts.

If relief is given or denied, the primary facts and the resulting obligations between the parties which formed the necessary ground on which relief was given or denied, and which therefore must have been adjudged to exist in fact, are, at least in general, said to be matter adjudged—*res judicata*. In *other* proceedings between the same parties afterward to be decided it is to be taken as settled that those *facts* are what in the former proceeding they were held to be.¹⁵

The characteristic of this doctrine is that it assumes to be true what perhaps is not true, but assumes it only as between the parties or those connected in interest with them, and only in other proceedings. The purpose and result of this rule of law is that what has been decided to be true and made the basis of one judgment is available as the basis of another judgment without being proved over again. But it is not the court's coming to a decision as to the facts of a case that makes the

¹⁴U. S. v. Moser, (1924) 266 U. S. 236, 45 S. Ct. 66, 69 L. Ed. 262. The correctness of a rule of law on which an earlier case was decided is not *res judicata* in a later case. The doctrine of collateral estoppel has no application to the correctness of an abstract rule of law. Compare Professor Austin W. Scott, "Collateral Estoppel by Judgment," 56 Harv. L. R. 1, 10.

¹⁵As this doctrine rests on a weighing of competing interests it is not always applied. The interest in security against illegal imprisonment is felt to be so strong that in most states a prisoner is entitled to an independent judgment on the merits upon successive writs of habeas corpus though brought on the same ground. *Salinger v. Loisel*, (1924) 265 U. S. 224, 230, 44 S. Ct. 519, 68 L. Ed. 989; *Wong Doo v. U. S.*, (1924) 265 U. S. 239, 44 S. Ct. 524, 68 L. Ed. 999; 38 Yale L. J. 299, *American Jurisprudence*, Title Habeas Corpus, Sec. 157. A court may have jurisdiction to enjoin an act of government in excess of governmental power, and its judgment dismissing a suit for injunction be valid even though the governmental act is not valid. But it does not follow that a second court must be powerless to save the complainant from an act it knows to be illegal for the sole reason that the first court did not know it to be illegal, especially where in the meantime the highest court of appeal has conclusively held that it is illegal. It may be the duty of a court to give relief that it knows as matter of law that a petitioner is entitled to.

facts *res judicata*. It is the entering of a judgment that makes *res judicata* the facts on which the judgment is based.¹⁶ So too it is not a court's decision that its judgment will be valid, nor its entering the judgment that makes it *res judicata* that the judgment is valid. To make the validity of the judgment *res judicata* in this sense of the term would require the entering of a second judgment based upon a finding that the former judgment was valid.

In short, in this sense of the term, *res judicata* applies only to those matters which go to make up the case before the court. It has no application to any other matters that the court has to consider in deciding what to do. The entry of a judgment, unappealed from, does not, under such a doctrine of *res judicata*, make it conclusive between the parties that the judgment has the effect it purports to have, any more than it makes it conclusive that it is just or that it is correct in point of law.

Thus in *Baldwin v. Traveling Men's Association*,¹⁷ where the question had been whether the pretended service on the defendant was sufficient in law, and the parties were before the court, the entering of judgment for the plaintiff made *res judicata* only the facts on which it was based, including the fact, held to exist because the service was deemed good, that the parties stood to each other in the relation of party suing and party sued. Mr. Justice Roberts said "The substantial matter for determination is whether the judgment amounts to *res judicata* on the question of the jurisdiction of the court which rendered it over the person of the respondent." The case did not decide that the court's determination that its judgment when entered *would be* valid made its *validity* *res judicata*.¹⁸

¹⁶*Oklahoma City v. McMaster*, (1905) 196 U. S. 529, 25 S. Ct. 324, 49 L. Ed. 587, 36 Corpus Juris 767.

¹⁷(1931) 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244.

¹⁸Compare Restatement of Judgments, Sec. 9. *Res Judicata* and Jurisdiction over the Person.

It has been questioned whether the doctrine of *res judicata* should apply to facts determined to exist and made the basis of a judgment, if it is proved that the court had no jurisdiction and that the judgment was consequently invalid. But the cases which hold that the doctrine may under some circumstances apply to facts made the basis of an invalid judgment have no bearing on the question whether a judgment may be *res judicata* of its own validity.

If the reason why the court lacked power to make a valid judgment is that the legislature had not seen fit to entrust it with deciding questions of the character of those it undertook to decide, as if a probate court should entertain an action of tort, there is force in the contention that no effect should be accorded its attempt to determine the facts. If a soldier's twin brother is convicted by court martial by mistake for the soldier and im-

All that, in this sense of the term, could have been res judicata in the Chicot case was that the municipality was indebted to its creditor, was insolvent, had petitioned for a discharge and that the creditor had been notified. It had no right that the creditor should release it. The question of law that remained to be decided was whether the court should release it. It was not res judicata that the municipality had been released. That was not within the issues of the case. It was not the basis of the judgment. It could not have been true until the judgment had been entered.

But the term res judicata is sometimes used in another sense.¹⁹ Relief, if given, is given in the form of a judgment or decree which, *provided that it is valid*, creates a new right that either supersedes or supplements the old right on which it was based, at least within the jurisdiction where the decree is made. Thus a judgment giving damages for breach of contract wipes out the claim on the contract and substitutes a new right on the judgment, which may be for accumulated interest and costs as well as for the claim that existed when the suit was begun. That this new right is to exist has been adjudicated, and so its existence may be called res judicata. In this use of the term, it prevents dispute, not as to the facts which the judgment established, but as to the efficacy of the judgment itself.²⁰

prisoned, it would not be unreasonable to hold that the government was estopped to deny his right to a soldier's pay. But it does not follow that his membership in the army is res judicata, if he applies by habeas corpus for release, or sues for false imprisonment. His acquittal by court martial might make his innocence res judicata in a later prosecution in a civil court, but it does not follow that his conviction by court martial would make his guilt res judicata. A purpose of restricting the court martial's jurisdiction was to secure to civilians the securities that attend trial in civil courts. It would defeat the purpose to make its decisions res judicata against him, not so to make them res judicata in his favor.

When, as in *Baldwin v. Traveling Men's Association*, (1931) 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244, the court has jurisdiction of cases and persons of the class before it but jurisdiction is challenged by special appearance for want of service, the appearance may be treated as empowering the court to decide as to the fact of service, and, if service is found, to make res judicata the issues between them, even if it be assumed that if there was no proper service the judgment was invalid and subject to attack by other creditors of the defendant. So, too, as has been suggested in discussing the case of *Davis v. Davis*, (1938) 305 U. S. 32, 59 S. Ct. 3, 82 L. Ed. 26, if in a suit for divorce, a court which has the parties before it decides mistakenly that the party suing is domiciled in the state and has cause for divorce, the decree of divorce may without inconsistency be held res judicata as to domicile or the existence of cause for divorce, although it were held that the decree was invalid, and its validity not res judicata between the parties.

¹⁹Beale, *Conflict of Laws*, Sec. 450.1, *Restatement, Conflict of Laws*, Sec. 450, note.

²⁰See *Cromwell v. County of Sac*, (1877) 94 U. S. 351, 24 L. Ed. 195.

When *res judicata* is used in this sense to mean that a valid judgment imposes the obligation it purports to impose, or, as in bankruptcy, extinguishes an obligation it purports to extinguish, it is a statement of the truth. It is true, not only between the parties, but as to all the world. Every valid judgment is a judgment *in rem* as to the matter it adjudges. The difference between what is ordinarily called a judgment *in rem* and what is ordinarily called a judgment *in personam* lies in the scope of the judgment—the character of the thing adjudged,—and not in the effect of the judgment within its scope.²¹ If A has a valid judg-

²¹The phrase, a *right in rem* (though occasionally used to mean a special right in a particular object) usually means a right which, like a right to a tangible object, exists against persons in general. Right is here used in its broad sense to include all the attributes of property, not only freedom from interference with one's property, but the privilege of enjoying it, and the power of disposing of it. An *action in rem* means an action whose object is to obtain a judgment that shall establish a right *in rem*. A *judgment in rem* means a judgment which establishes or purports to establish such a right. Such a judgment is usually, but not necessarily, a judgment establishing against all possible adverse claimants a property interest in a tangible object, generally a lien upon it. The appropriate place to bring the action is generally the place where the object happens to be, and not a different place where the claimant or the owner happens to be, or where he is domiciled, or where the object has a situs for taxation. For it generally would be unjust and impracticable to require the claimant to go in search of the owner, it cannot certainly be known who all the owners are, and only at the place where the object is can a judgment for the claimant effectually be executed by delivering the object to him, or selling it and giving him from the proceeds enough to satisfy his claim. An owner, on the other hand, usually has means of knowing where his property is and even in case of an estray can go in search of it.

But a judgment *in rem* may be rendered where no property interest exists. There may be need of a judgment in adoption proceedings which shall establish the right to the custody and future earnings of a child against all possible claimants, or, where slavery exists, to a conclusive determination of freedom from any master. It might become desirable to establish beforehand the validity as against adverse claimants of a proposed marriage, by requiring all who know reason why the parties should not be joined in matrimony to speak then or forever hold their peace. The proper forum for such judgments would seem to be, not the place where the persons concerned happened to be found, but the place of their domicile.

As we started by saying that the place to bring an action *in rem* is the place where the *res* is, we now say in a case of permanent adoption, as distinguished from temporary custody, that the real *res* is not the child, but the relation of parent or adopter and child, and that it has its situs at the appropriate domicile. In truth we do not first see that the *res* is there and consequently determine that that is the place with jurisdiction to act. We decide that that is the proper place to act, and, because we think so, it seems to us that that is where the *res* is. We think of it as belonging to the place that we think ought to control it.

There are cases where the judgment is only *in personam*, but the presence of the parties is not necessary, or in some cases sufficient, for jurisdiction. When it has been determined that jurisdiction should depend on the presence of a chattel attached, or of a debtor garnished, or on the domicile of a party to a suit for divorce, we think of the suit as related to a thing situated where the jurisdiction exists, and call it an action quasi

ment against B, it is true as regards everybody that A has a claim on the judgment against B, and no other creditor of B can object to A's being admitted to a claim against B's assets, unless ground is shown for setting A's judgment aside.²² The fact that the judgment is erroneous is immaterial. It is not a case of treating as true that which may not be true. That A has a claim on the judgment is true. *Res judicata* in this sense is not a rule that applies only as between the parties to the judgment, nor is it, like the rule that treats facts found to be true in one case as true in another, a rule that the legislature could destroy without destroying the validity of judgments. But it can be applicable only when the court had power to bring the judgment right into existence. Hence it might be less confusing to call it the rule of *res facta*, and so avoid ambiguity in the use of the term *res judicata*.

JURISDICTION OF COURTS

A court has to make up its mind whether it has authority to enter judgment on the merits, and if so what judgment. The rea-

in *rem*. It resembles an action in *rem* in that jurisdiction does not rest on control over the person of a defendant, and that judgment is enforceable against the defendant only as to his interest in the subject matter on which the jurisdiction rested. (Compare the Introductory Note in Chapter I of the Restatement of Judgments.)

The value and validity of a distinction between rights in *rem* and rights in *personam* has been questioned. It has been suggested that rights might better be classified as multital, paucital and unital. Hohfeld, *Fundamental Legal Conceptions*, 26 *Yale L. J.* 710, 716, 718, 733, 743, Corwin, *Jural Relations and their Classification*, 30 *Yale L. J.* 226, 232, note 4. But the distinction is real and of practical importance, however inaptly it may be expressed by contrasting *res* with *persona*. Its essence lies in the character of the right, and not in the number of persons against whom it is available. That is an accidental consequence of its character, though it may generally be a convenient badge by which to identify it. In a suit for a breach of a right in *rem*, it suffices for the plaintiff to prove the act or omission of the defendant which is alleged as a breach of duty, and it then rests on the defendant to show facts which exempt him from the duty, such as consent to what would otherwise be a trespass. If the suit is for breach of a right in *personam*, the plaintiff must show, not only defendant's conduct, but facts that subjected the defendant to a duty to conduct himself otherwise, such as the making of a contract. Whether the facts show that one, a few, many, or all but one person are subjected to or exempted from the duty is of little significance. Nor is it of significance that the law may sometimes make an act a tort only when done by members of a certain class, so that the plaintiff must prove not only the act, but that it was done by a member of that class.

²²*Mattingly v. Nye*, (1869) 8 Wall. 370, 373, 19 L. Ed. 380; *Anderson v. Hultberg*, (1918) 247 Fed. 273, 277-8, cert. denied 248 U. S. 581, and see *Gelston v. Hoyt*, (1818) 3 Wheaton 246, 4 L. Ed. 381 (a judgment denying the existence of a right in *rem* is conclusive as to everybody). A creditor has an interest in the entry of any judgment against his insolvent debtor. But the law does not require those whose interests are concerned to be made parties to an action, but only those whose rights are to be established or disestablished by the judgment.

sons of convenience that underlie the doctrine which makes decisions of fact in one case conclusive between the parties in another, may apply to a considerable extent to conclusions about the validity of a judgment about to be rendered. That doctrine however is inapplicable, because if the legislature has decreed that the judgment, if made, shall be void of effect, it cannot alter the rights of the parties, and hence cannot properly be given effect so as to make it alter them. That the court or the parties believed that the judgment would determine their rights is immaterial. Hence the maxim that there should be an end to litigation is irrelevant. If, indeed, the legislature thinks it policy that the court's mistake as to the intended limits of its power should not make its judgment ineffective, it can, and often does, confer on the court an enlarged jurisdiction—a power to decide, not merely cases of a certain class, but cases which the court finds to be of that class. For like reasons a similar power is often granted to administrative officers and is conceded by the common law to private persons. For any person, layman, administrator or judge, may have to make up his mind whether an occasion has arisen on which it is his duty to act. If he deems it his duty, it is to be expected that he will act. In the interest of efficiency, fairness or finality it is often desirable to treat his act as valid even when it was mistaken. Thus a citizen may validly arrest an innocent person he reasonably suspects of a felony that has actually been committed. An agent may often bind his principal though he acts on too broad an interpretation of his authority,²³ or under a mistake about the existence of the facts on which his authority depends.²⁴ Administrative officers are frequently empowered and, in a sense, bound to act when they believe, though mistakenly, that the facts of a case are such as would require their action.²⁵ Whether to give such power to a court is a question of policy for the makers of constitutions and statutes to decide. If such power has been conferred by a legislature that had constitutional power to confer it, the court has jurisdiction over a case which it finds to be within the meaning of the jurisdictional statute, and the judgment is valid, not as *res judicata*, but of its inherent force.

The Constitution and the acts of Congress confer on federal district courts a general jurisdiction over cases of monetary im-

²³Restatement: Agency, Secs. 38, 44.

²⁴Restatement: Agency, Sec. 45, comment (c).

²⁵"The Separation of Governmental Powers," 29 Yale L. J. 369, 384-6.

portance between citizens of different states, and over cases arising under laws of the United States. If a question arises in a district court as to whether the parties to a pending case are citizens of different states, or whether the case is of the kind meant by the phrase "arising under * * * the laws of the United States," it is the duty of the court to decide the question and if it decides it in the affirmative to enter judgment on the merits. Unless the question is free from substantial doubt there is reason to expect that the court may enter such a judgment. The principle applies which under analogous circumstances frequently enables a private agent to bind his principal, and an administrative officer to act validly though mistakenly. Thus in *Des Moines Navigation Company v. Iowa Homestead Co.*²⁶ where the correct exercise of federal jurisdiction depended upon every plaintiff's being a citizen of a different state from the state of which any defendant was a citizen, it was held that the judgment was valid though opposing parties were citizens of the same state. The grant of jurisdiction over controversies between citizens of different states contemplated its exercise over persons who were found to be such citizens. The court said. "To determine whether the suit was removable in whole or in part, or not, was certainly within the power of the circuit court. The decision of that question was the exercise, and the rightful exercise, of jurisdiction * * *" In *Dowell v. Applegate*,²⁷ a debtor conveyed land and his judgment creditor sued the grantee to have the deed set aside and the land sold to satisfy the judgment. The federal court took jurisdiction because it was alleged that the deed was void by federal law for lack of sufficient federal revenue stamps, set the deed aside and ordered the land sold. The creditor bought it. The grantee sued him in a state court to quiet title, alleging that the sale was void because the federal court had no jurisdiction to order it. The United States Supreme Court held on writ of error to the state court that even if the claim as to lack of stamps was not enough to make the case one which the federal trial court was intended to decide, it was one which the Constitution and laws empowered it validly to decide, and that the sale pursuant to its order passed title. It was said that whether the case arose under the laws of the United States was a question which the trial court "was competent to determine in the first instance" and that its determination was conclusive on the parties who

²⁶(1887) 123 U. S. 552, 8 S. Ct. 217, 31 L. Ed. 202.

²⁷(1894) 152 U. S. 327, 340, 14 S. Ct. 611, 38 L. Ed. 463.

could question it only on appeal. This meant that the decree was valid, not that it was conclusive evidence of its own validity, for the case came from a state court on writ of error and it is no error in federal law for a state court to hold that parties before it are at liberty to give evidence of the truth about a federal judgment. In *Texas and Pacific Railway Co. v. Gulf, etc. Ry.*,²⁸ it was held that a district court with statutory authority to enjoin the construction, without a certificate of necessity, of new railroad trackage, provided that the trackage was an extension of its line, as distinguished from a spur, might validly enjoin the construction of a track which was only a spur, on a mistaken finding that it was an extension. Mr. Justice Brandeis said. "Every court of general jurisdiction has power to determine whether the conditions essential to its exercise exist."

Accordingly in the *Chicot* case it was said. "The lower federal courts * * * are courts *with authority* (italics supplied) to determine whether they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act." And in *Stoll v. Gottlieb*²⁹ it was said. "It is frequently said that there are certain jurisdictional facts, the existence of which is essential to the validity of the proceedings and the absence of which renders the act of the court a nullity. * * * For instance, service of process in a common law action within a state, publication of notice in strict form in proceedings in rem against absent defendants, the appointment of an administrator for a living person, a court martial of a civilian. Upon the other hand there are quasi-jurisdictional facts, diversity of citizenship, majority of litigants, and jurisdiction of parties, a mere finding of which, regardless of actual existence, is sufficient."

In short, so long as a district court acts within reason, and the parties are properly before it, the Constitution and statutes do not intend to make the validity of its judgment depend on the truth of its findings of fact or of its interpretation of the jurisdictional statute.³⁰ But if the Constitution deprives the United

²⁸(1926) 270 U. S. 266, 46 S. Ct. 263, 70 L. Ed. 578.

²⁹(1938) 305 U. S. 165, 176-7, 59 S. Ct. 134, 83 L. Ed. 87

³⁰*Matter of Gregory*, (1911) 219 U. S. 210 U. S. 217, 31 S. Ct. 143, 55 L. Ed. 184. (Per Hughes, J., "Given a valid enactment, the question whether a particular case falls within the prohibition is for the determination of the court to which has been confided jurisdiction over the class of offences to which the state relates.") *Denver First National Bank v. Klug*, (1902) 186 U. S. 202, 22 S. Ct. 895, 46 L. Ed. 1127, (bankrupt validly held not entitled to discharge because found, though erroneously, to be a farmer.),

States of power to produce a specific result, such as the release of a state municipality from debt, the matter is different. Courts, as well as Congress, are deprived of power to bring it about, and a judgment that purports to produce it is necessarily void of effect.

On the other hand a judgment is not invalid merely because it enforces a void statute any more than because it misinterprets a valid one. In either case, if it is a *judgment of a kind the court had power to make*, for example, a judgment for money in an action of tort or contract, the judgment is valid, though in either case it is erroneous because there was nothing in the statute to justify it. The exercise of an authorized power is not invalid merely because the way it is exercised results from a misunderstanding of the law about the subject matter, whether the law involved is common, statutory or constitutional. Mistakenly to adjudge that a man is under obligation to do what he is not under obligation to do, is not more invalid when the reason he is not under obligation to do it is that a statute which purports to impose the obligation is void than when the reason is anything else. Imposing an obligation by misunderstanding the Constitution is like imposing it by misunderstanding a fact. This is so though the reason the statute is invalid is that it deprives of property without due process of law. A money judgment that enforces an invalid statute duly found to be valid takes by due process of law. It is like fining an innocent man duly found to be guilty. Consequently the judgment of a federal court, if the case is of a class to which its jurisdiction extends, is valid and can be attacked only for error, in spite of the fact that by misconstruction of the Constitution it enforces an unconstitutional statute and thereby denies a constitutional right.

Thus if Congress should enact that gratuitous promises should carry contractual obligation, or that no promise should be en-

Fairbanks Shovel Co. v. Wills, (1916) 240 U. S. 642, 649, 36 S. Ct. 466, 60 L. Ed. 841 (non-resident adjudicated a bankrupt), *Noble v. Union River Logging R.R.*, (1893) 147 U. S. 165, 173-177, 13 S. Ct. 271, 37 L. Ed. 123, and cases there cited ("Examples of these are the allegations and proof of the requisite diversity of citizenship or of the amount in controversy in a federal court, which when found by such court cannot be questioned collaterally."), *In re Sawyer*, (1888) 124 U. S. 200, 220, 8 S. Ct. 482, 31 L. Ed. 402, *Jackson v. Irving Trust Co.*, (1941) 311 U. S. 484, 501, 503, 61 S. Ct. 326, 85 L. Ed. 297, (though statutory right to sue is limited to "any person not an enemy" a judgment is valid in spite of an erroneous determination of "the so-called 'jurisdictional' question of the right to sue"). Compare *Fall v. Eastin*, (1909) 215 U. S. 1, 30 S. Ct. 3, 54 L. Ed. 65 (master's deed of land in another state does not pass title)

forcible unless under seal, a suit on a gratuitous promise, or a defense claimed by reason of the act in a suit on a contract not under seal, would arise under a *de facto* law of the United States, and a judgment, state or federal, of a court with jurisdiction of the parties and the cause erroneously holding the statute constitutional and giving it effect would be valid. So it is if the United States sues to collect a tax and the court wrongly overrules a contention that the tax is a tax on exports within the meaning of the clause that says "No tax or duty shall be laid on articles exported from any state." Or wrongly overrules a contention that the tax being arbitrarily imposed on a single class of persons, deprives them of property without due process of law. The judgment is one which the court has power to make, for it is a judgment on a claim for money arising under a law of the United States, or in a suit to which the United States is a party. The judgment is valid, though the statute was not. Its enforceability rests on its validity and not on any theory that, though invalid, its validity is *res judicata* between the parties to it. Yet if the Constitution had said, "No judgment enforcing the collection of a tax on exports shall be valid," it would be plain that no doctrine, whether called *res judicata* or by any other name, could by attaching itself to such a judgment maneuver it into a position of validity or disable anybody from asserting its invalidity merely because it had been entered. And so of any other judgment which expressly or by implication the Constitution makes invalid.

It cannot be the intent of the makers of law that a court from which they have deemed it politic to withhold power to make a judgment that shall have effect of its own force shall nevertheless have power to make a judgment that shall become indisputable by the mere fact that it was made. To say that a judgment is not within a court's intended power is to say that it is intended to be void of its purported effect. That appeal to a higher court was allowed but not taken cannot enlarge its effect unless it was intended that it should be valid unless appealed from. That the court has to decide, and that the parties have submitted to its decision, the question whether it was intended to have the power claimed is relevant only if it was intended to have the power on condition that it decided it was intended to have it. A judgment intended to be void if made, is not intended to bind the parties because made.

It is hard to support in principle the doctrine that a person may for reasons of policy be compelled to acquiesce in the judgment

of a court from which for reasons of policy the legislature has withheld authority to control his rights. The only decision that may seem to give substantial support to such a doctrine is the *Chicot* case.³¹ That case professed to follow *Stoll v. Gottlieb*.³² *Stoll v. Gottlieb* went on the ground that the judgment there in question was valid.

In *Stoll v. Gottlieb*, a federal court, as an incident to a reorganization in bankruptcy, made a decree which purported to discharge from obligation, not only the bankrupt, but also one who had guaranteed that the bankrupt would pay his debts. A creditor, thinking the discharge invalid, sued on the guaranty in a state court of Illinois. The guarantor pleaded that the discharge made it *res judicata* that he was not liable. If the discharge was valid the plea was good. Thereupon the creditor applied to the federal court to vacate its decree as invalid. The court refused to vacate it. According to the doctrine that Congress intends to authorize the district courts to act in cases they reasonably deem to fall within the meaning of a statute that gives them jurisdiction, the discharge of the guarantor was valid if Congress might validly have authorized it. However, the Supreme Court of Illinois thought it invalid because not within the true meaning of the bankruptcy act. That

³¹(1940) 308 U. S. 433, 60 S. Ct. 343, 84 L. Ed. 370, *supra* note 4. *Tremies v. Sunshine Mining Co.*, (1939) 308 U. S. 66, 60 S. Ct. 44, 84 L. Ed. 85, holds only that the decision of a court of competent jurisdiction that another court did not have jurisdiction may be *res judicata* between the parties like any other decision of essential fact. *Sunshine Coal Co. v. Adkins*, (1940) 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263, *supra* note 8, sustains a federal tax on sales of coal found by a commission to be bituminous, or actually bituminous and not found by the Commission to be non-bituminous. The Commission was practically a board of assessors to determine, not value, but the character of coal as to taxability. In a suit to enjoin the collection of a tax on coal which the Commission had held to be bituminous, their holding having been affirmed on judicial review as supported by substantial evidence, it was pleaded that it was *res judicata* that the coal was bituminous. The trial court dismissed the suit, and the Supreme Court affirmed the dismissal, saying that the authority of the Commission was clear, and that the trial court had had no jurisdiction to determine the character of the coal. This means that a tax on coal which the Commission should find to be bituminous was valid. The decision of the reviewing court that there was evidence that the coal was bituminous was not a decision that it was bituminous. It merely left the order of the Commission in effect so far as it had intrinsic force. If it were merely *res judicata* in the ordinary sense that the coal was bituminous, it would not have been true that the trial court had no jurisdiction to determine its character. It would have been bound to determine its character, but unless in so doing it followed the decision of the Commission its judgment would have been reversible for error.

³²(1938) 305 U. S. 165, 59 S. Ct. 134, 83 L. Ed. 104. For comments on this case, see 39 Col. L. R. 274-9; Geo. L. J. 1137-9; 23 Minn L. R. 673-5; 6 Univ. of Chicago L. R. 293-6, 87 U. of P. L. R. 346-8, 25 Va. L. R. 725-9; 48 Yale L. J. 879-87.

court therefore held, correctly it seems on principle, and conclusively as to the law of Illinois, that the validity of an invalid decree is not *res judicata* between the parties to it. The act of Congress which requires state courts to give faith and credit to federal judgments only requires a state court to treat a federal judgment as it would treat a similar judgment of its own state. Hence the Illinois court concluded that it was not bound to give faith and credit to what it believed to be an invalid judgment, and affirmed the judgment against the guarantor. On certiorari to the Supreme Court of the United States the judgment was reversed on the ground that whether or not the original decree was valid ("whether or not power to deal with the particular subject matter was strictly or quasi jurisdictional"), at any rate Congress had intended to empower the court, when its authority was challenged, to act according to what it reasonably believed its statutory authority to be, so that the discharge of the guarantor, having been affirmed when challenged, was valid, even assuming that Congress had not intended the court to make it. Mr. Justice Reed said. "* * * effect as *res judicata* (i.e. as matter validly adjudged) is to be given the federal order, if it is concluded it was an effective (i.e. valid) judgment in the court of its rendition. The problem before the Supreme Court of Illinois was not one of full faith and credit (i.e. of the effect to be given to a judgment deemed invalid) but of *res judicata*, (i.e. of the validity of the judgment)." The federal question, he said, was as to "the power of the federal courts" where rights are claimed under a valid statute. Though a court does not have jurisdiction over matters beyond the scope of its authority "there must be admitted, however, a power to interpret the language of the jurisdictional instrument." (i.e., validly to make judgments reasonably deemed authorized.) It was further said that to permit other courts to treat the judgment as valid or void according to their agreement or disagreement with the statutory interpretation made by the court in which it was rendered would produce uncertainty and give no warrant of correctness. This meant that the judgment should be treated for all purposes as valid, that is, that it was valid. The case necessarily holds that the judgment was valid because its validity was the only question before the court. For *res judicata*, in the sense of a rule which excludes evidence to show the truth is, in a state court, matter of state law, and the Illinois court had held that by the law of Illinois the parties were at liberty to give evidence of the truth, and to show that the judgment was invalid, if it really were so. The only error

in federal law that the Illinois court committed was in holding that the judgment was invalid when by federal law it was valid.

In *Chicot County Drainage District v Baxter Bank*,³³ the District was sued on its bonds in a federal court. It pleaded that by the decree of a bankruptcy court it had been discharged of liability, and that its non liability was consequently "res judicata." The trial court held the plea bad on the ground that the discharge was invalid since in the Ashton case the Supreme Court had held that the act of Congress which purported to authorize the discharge was invalid. The Supreme Court reversed the judgment. Mr Chief Justice Hughes cited the case of *McCormick v Sullivan*³⁴ in which a federal decree was held to be valid though it did not show diversity of citizenship, and said that the federal courts have "authority to determine" whether they have "jurisdiction" (i.e. power) to enforce a de facto act of Congress. The bankruptcy court therefore "had the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata (i.e. matter validly adjudged) in a collateral action. *Stoll v. Gottlieb* was cited as authority for this statement and was said to make it free from doubt. It was then said that it made no difference that there had been no attack on the decree in the court that made it, and that its assumption of jurisdiction was acquiesced in. Mr. Chief Justice Hughes did not say that the decree was res judicata merely as between the parties to it. He said that the court had authority to determine its jurisdiction and that its decree could not be attacked except on appeal. His argument was that the act of Congress that purported to confer jurisdiction was not a nullity, that the case arose under a de facto law of the United States, and that a judgment enforcing it was valid though erroneous. The citation of *Stoll v. Gottlieb* as conclusive authority shows that that was what he meant, because otherwise it is not in point. And in the later case of *Jackson v. Irving Trust Company*³⁵ Mr. Chief Justice Hughes cited both the Stoll and Chicot cases to the point that "the jurisdiction of the District Court attached when the suit was brought" and "the court was authorized to determine" the issues.

The Chicot case seems therefore to have been treated as like

³³(1940) 308 U. S. 371, 60 S. Ct. 317, 84 L. Ed. 329, rehearing denied, 309 U. S. 695, note 5 supra.

³⁴(1825) 10 Wheaton 192, 23 U. S. 192, 6 L. Ed. 300.

³⁵Supra, footnote 30.

a case where Congress had levied an invalid tax on exports and a court, thinking the tax valid, had entered a money judgment for its amount. But there is a vital difference. The Constitution does not forbid money judgments. According to the Ashton case, it does forbid a federal discharge of a state municipality.

If, as the Restatement assumes, the Supreme Court, in the Chicot case, held unanimously that a judgment which the Constitution made invalid was res judicata of its validity between the parties; it is strange indeed that on the same day the same judges unanimously held in *Kalb v. Feuerstein*³⁶ that a judgment which Congress made invalid could not be res judicata between the parties because the act of Congress, like the Constitution, was the supreme law of the land. And that in so holding they should cite the Chicot case together with *Stoll v. Gottlieb* in illustration of the point that the judgment of "a court of competent jurisdiction" is in general not subject to collateral attack, although a limitation on a court's jurisdiction may make its acts "nullities."

In the Chicot case it was said. "The lower federal courts * * * are courts with authority * * * to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act." It was also said "The court has the authority to pass on its own jurisdiction and its decree sustaining jurisdiction * * * is res judicata in a collateral action." The statement is true as to the ground of action, but it is inapplicable to the procedure or the remedy. It was the validity of the remedy that was in question. Probably Mr. Chief Justice Hughes would have agreed that if Congress prescribed for crime a cruel and unusual punishment, the provision forbidding its infliction would have cut down the "authority" of the court to impose it, and that its sentence would be void. And so it must be if an act of Congress purports to authorize a trial without jury, a decision by tossing a coin if evidence is balanced, ordering a bankrupt to work out his debts as servant to creditors, enjoining the expression of opinion on a matter of public concern, or taking private property for public use without compensation. A federal discharge of a state municipality from debt stands on the same footing, if the Constitution puts it beyond federal power. And if the court's statement means, as the Restatement understands it to mean, that such a decree though invalid estops the party to assert its invalidity, the Restatement itself treats it true only in cases where it is good policy to

³⁶Supra, footnote 4.

give partial effect to a judgment that the lawmakers have made void of effect.

There is a sense in which every court has jurisdiction to determine its jurisdiction. If it dismisses a suit for lack of jurisdiction, the suit is effectually dismissed. Thereupon it may become *res judicata* between the parties that as to suing in that court on that cause the power-liability relation does not exist between them, so as to furnish a defense to a second suit. But a court determines that it *has* jurisdiction at its peril. A decision that it has power to make a valid judgment does not give power to make a valid judgment. The cases which hold that federal courts may make valid judgments in cases they find to be between citizens of different states, or to fall within the meaning of a valid act of Congress, have no application where the question is whether the Constitution cuts down the power of the court to give a remedy. There is no difference between a provision that says that the power of the United States shall not extend to discharging a state municipality from its debts, and a provision that says that no federal discharge shall have the effect of discharging it.³⁷

That a judgment unconstitutional in what it decrees must be invalid in the same sense and to the same degree as a statute unconstitutional in what it ordains may appear from a consideration of the nature of judgments.

THE NATURE OF JUDGMENTS

The entering of a judgment, though not a legislative act within the meaning of a constitutional grant of legislative as distinguished from judicial power, is legislative in its effect, because it creates

³⁷A judgment of a district court, unconstitutional in what it decrees, can in a strict sense gain no validity by being affirmed on appeal in the Supreme Court. The affirmance will create a precedent binding all courts to treat it and other like judgments as valid, but cannot make it really valid. The force of the precedent will be at an end if in a later case the Supreme Court overrules its former decision and holds such a judgment to be a nullity. And overruling it will establish by the force as a precedent of the overruling decision that the former judgment, though affirmed by error, was really invalid. Thus if, pursuant to statute, it is decreed that a bankrupt must work out his debts as his creditors' slave, and the decree is affirmed, but in a later case that decision is overruled and a similar judgment reversed, the decree must now by force of precedent be held to be invalid and not to be continued in execution without further direction from the Supreme Court. This does not apply to an illegal method of reaching a result legitimate in itself. If a man were sentenced to imprisonment for crime upon a conviction reached by tossing a coin, the affirmance of the judgment would seem to make the sentence valid, for its substance is within governmental power.

a new right, or sometimes extinguishes an old right. It differs from the alteration of rights by the legislature in that the new situation brought into existence by the judgment is created merely by way of enforcing a right which the court determines to be already in existence. A legislature creates rights because it thinks it desirable that the rights should exist. A court can create a right only when the conditions exist on which the constitution and legislature have effectively authorized it to do so. These conditions usually are that certain facts shall exist and that the court shall determine that certain other facts exist. Unless forbidden by the constitution, a legislature may grant a divorce,³⁸ or, on terms, release an insolvent from his debts. If it prefers, it may confer on persons in general a right under prescribed conditions to have a divorce or a release from debt, and vest a court with power to bring about the divorce or release on its determination that the prescribed conditions exist. But the entry of the decree, as distinguished from the adjudication that the facts on which it is based exist, is a thing of the same nature as would be the passing of a statute that purported to bring about the same result. Regarded as a result to be accomplished, it is plain that if Congress cannot by special act dissolve a marriage between residents of a state or discharge a state municipality from debt because the subject matter is beyond its granted powers, it cannot by delegating the power to a court to be exercised on prescribed conditions itself empower its delegate to make an effective discharge. Any power the court can have must come from something in the Constitution relating to the judicial, as distinguished from the legislative, power, and if the constitutional limitation is applicable to the judicial power the court cannot possess it.³⁹ According to the Ashton case, the reason

³⁸Maynard v. Hill, (1888) 125 U. S. 190, 8 S. Ct. 723, 31 L. Ed. 654.

³⁹That an entry of judgment is legislative in nature is in most cases obscured by the fact that it is for damages or specific performance, and seems to do little, if anything, more than to reiterate a liability for damages or a duty to act that already exists. Yet even such a judgment creates a new right-duty relation not identical with the relation on which it is based. A judgment in tort or contract may include an added liability for costs and extinguish the claim on which it is founded. And it is evident that a murderer owes no duty to the state to hang himself. A creditor owes no duty to release an insolvent debtor. A husband who has given his wife cause for divorce owes no duty and has no power to release her from the marriage bond. A petition in bankruptcy or divorce does not ask for an enforcement of obligation, but for a release from or alteration of obligation. A court is powerless to give such relief except through action by the legislature which shall be effective in conferring power upon it. If the Constitution, expressly or by implication, withholds from Congress power to discharge a state municipality from debt, no act of Congress can of itself empower a court to make a decree which shall be effective as a discharge in fact.

for withholding from Congress power to free state municipalities from debt is that its exercise would interfere with the control of their own affairs which the Constitution is believed to intend to reserve to the states. This shows that the limitation applies to the federal government as a whole and therefore to the courts.

A situation like that resulting from the extension of the bankruptcy act to state municipalities would arise if Congress should amend a law authorizing courts of the United States to grant divorces to citizens of the District of Columbia by adding that they might also divorce citizens of states. A divorce granted by Congress itself to citizens of a state who petitioned for it could not really end their marriage, and a federal court's decree of divorce, though unappealed from, could not end it. If Congress, lacking power to discharge state citizens of the obligations of marriage, cannot empower a federal court to discharge them, no more, if it lacks power to discharge a state drainage district from debt, can it empower a federal court to discharge it. The district remains indebted and it is the duty of its officers under state law to pay its debts as it was before. They would be subject to state compulsion to pay, or to discipline for not paying, as if the decree had not been entered. On no sound principle can a decree which is without effect in itself become effective by obliging other courts to treat it as if it had effect.

In *Frank v. Mangum*,⁴⁰ a conviction alleged to have been obtained by a trial so unfair as to be inconsistent with due process was upheld in habeas corpus proceedings on the ground that an appellate court had supplied due process by concluding after careful review that the trial had been fair, but there was no hint that the trial court's tacit determination in sentencing the prisoner after trial that the trial had been fair made the sentence valid or made its fairness or validity in any sense *res judicata*. If it did not, it is hard to see how entering the decree that purported to extinguish the debts of the Chicot District could extinguish them or make it *res judicata* that they had been extinguished.

When the Constitution says that slavery shall not exist, that cruel and unusual punishment shall not be inflicted, and that powers not granted are reserved, it uses three ways of expressing similar results. It makes no difference as to federal power whether the Constitution says that slavery shall not exist, that the status of slavery shall not be imposed, or that power to impose it is not

⁴⁰(1915) 237 U. S. 309, 35 S. Ct. 582, 59 L. Ed. 969.

granted or is reserved. So too if the Constitution says in words or by implication that power to discharge a state municipality from debt is reserved or is not granted, it is the same thing as if it said that no such discharge shall be granted, and that if granted, freedom from debt shall not thereby be brought about.

Titus Oates, being convicted of perjury in swearing away men's lives, and not of homicide, could not be condemned to death. He was sentenced to be whipped at the tail of a cart once a fortnight from Newgate to Tyburn and back, presumably in the belief that he could not survive many such whippings. The validity of the sentence, even if imposed in good faith, would have to be judicially determined, but is it true that "As the question of validity was one which had to be determined by a judicial decision, if determined at all, no reason appears why it should not be regarded as determinable by" the court that imposed it, "like any other question affecting its jurisdiction?" If not, why is it true of a judgment that assumes to deprive a man of his property in municipal bonds?

A member of a legislature or of an administrative board is as competent to decide matters of law or fact as if he were a judge. He would not acquire learning or wisdom merely by being elevated to the bench. If action of a court in excess of federal power is held to be valid, or to save litigation is held to create an estoppel to deny its validity, merely because the body that took the action believed that it would be valid, it remains to be seen whether the same principle will be applied to prevent attack on a rate regulation as confiscatory which a commission after hearing has believed to be amply remunerative, or to require courts to treat as valid a statute which a legislature, after giving persons interested an opportunity to be heard, has decided to be within its power to pass. Such a doctrine might save judges so much trouble as almost to compensate them for loss of prestige as the ultimate guardians of constitutional liberty.

Section 10 of the Restatement of Judgments appears to have little support in reason, precedent or legal analogy. Nothing indicates that it is generally law in the United States.